Supreme Court, U.S.
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No. 97-365

In The

Supreme Court of the United States

October Term, 1996

KIMBERLY BRANDT,

Petitioner,

vs.

SHOP 'n SAVE WAREHOUSE FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHELLE M. CAIN
Counsel of Record
ROBERT W. STEWART
SHELLEY M. ROITHER
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
Attorneys for Respondent
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

71887
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

44 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a conflict exists between the circuits on the following questions, and if so, whether such conflict pertains to an important matter:

A. Whether Judgment as a Matter of Law for an employer, can never be appropriate in a discrimination case, where at least one (1) of the employer's legitimate, non-discriminatory reasons is rejected as untrue?

B. Whether a Plaintiff is estopped to complain that a Court found the absence of intentional discrimination where it did so through express reliance upon Plaintiff's argument that the successful candidate was the beneficiary of preselection.

RULE 29.6 STATEMENT

Respondent is a wholly owned subsidiary of Fox-Wetterau, Inc. — which is a wholly owned subsidiary of SuperValu Holdings, Inc. — which is a wholly owned subsidiary of Supermarket Operations of America, Inc. — which is a wholly owned subsidiary of SuperValu, Inc.

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STATEMENT OF THE CASE

Facts

A. ***Introduction.*** Shop 'n Save operates a number of grocery stores in Illinois and Missouri. Brandt, a member of UFCW Local 88, worked out of the Union's hiring hall as a meat clerk or meatwrapper on a temporary basis for a variety of stores, including Shop 'n Save, from approximately 1987 to July 1991 (TR[1] II-5-9). In August 1990, while Brandt was working out of the hiring hall, she wrote Richard Marty, Shop 'n Save's then-acting V.P. of Human Resources,[2] and Harold "Butch" Covili, Senior V.P. of Operations,[3] indicating her interest in being hired as an employee of Shop 'n Save in several positions, including management and Apprentice Meatcutter (TR III-31-32; DX-C).

B. ***The Courtesy Interview.*** Marty provided Brandt the opportunity of a courtesy interview on September 7, 1990 (TR III

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1. References to "TR __-__" are to the volume and page number of the transcript of the trial proceedings before the United States District Court for the Eastern District of Missouri, the Honorable Terry I. Adelman presiding. References to "App. __" are to the Appellant's Appendix, prepared pursuant to Rule 30 of the Federal Rules of Appellate Procedure and filed with the Eighth Circuit. References to "PX __" and "DX __", respectively, are to Plaintiff's and Defendant's exhibits at trial and at issue herein and are included in the Appendix filed with the Eight Circuit.

2. Richard Marty acted as Senior V.P. of Human Resources from May 1990 until he hired John Dougherty to replace the V.P. of Personnel, Nancy Moss, who had resigned (TR II-217; III-24-26). John Dougherty was V.P. of Human Resources and/or functioned in a similar position from the time of his hire on or about October 10, 1990 through trial (TR II-224; III-214).

3. Harold "Butch" Covili was Senior V.P. of Operations for approximately two (2) years prior to June 1991. In May or June 1991, Covili went to work for corporate Wetterau "on loan" for approximately ten (10) months, traveling to Florida and New Jersey to assist in the management of corporate stores in those locations (TR II-215-16; TR III-17-18).

34-35). At trial Brandt acknowledged the interview was merely "a courtesy" and knew she was not seriously being considered for management because, as she testified, she lacked college (TR II-113-14). Brandt has conceded this point to this Court (Petition at 3). By letter dated September 17, 1990, Marty advised Brandt that Shop 'n Save would not offer her employment, but that her application would be placed in the "active files" for one year (TR III-35-36; PX 31).

C. *"Active Files".* Shop 'n Save's "active files" refer to those files wherein applications and resumes are retained for the one year period required by law (TR III-29-30, 36, 221). As explained by Dougherty, it is not a normal practice of Shop 'n Save to review documents in its "active files" in order to search for candidates for job openings (TR III-221-22). Neither John Dougherty nor Richard Marty *ever* looked through the "active files" for purposes of searching for candidates to fill positions for Shop 'n Save (TR III-30-31, 222). Despite Plaintiff's allegation that Marty testified that "active files" might help the Company fill an employment need (Petition at 3), Marty testified to the opposite, stating that Shop 'n Save had never looked through "active files" to find candidates (TR III-30-31, 222).

D. *The Decision To Hire An Apprentice Meatcutter And The Qualifications Established.* In October 1990, John Dougherty replaced Marty as V.P. of Human Resources. In May 1991, Bill Fant[4], Meat Manager, approached Dougherty concerning the hire of an Apprentice Meatcutter (TR III-46-47, 216). This particular Apprentice Meatcutter position was not, however, to be a typical meatcutter position (TR III 46-47, 216-17). Instead, the individual selected was to be hired to be groomed for ultimate promotion into a management position, after gaining meatcutter experience (TR III 46-48, 216-17).[5] Fant told Dougherty that he believed the right

4. Bill Fant was Shop 'n Save's company-wide meat manager (TR III-40-41).

5. Fant indicated the Company was weak in managers with a meat (Cont'd)

candidate would have college and management experience (TR II-46-48). The qualifications for this particular position were set at this time after discussion between Dougherty and Fant — the ideal candidate for the Apprentice Meatcutter/trainee position would possess some college education and prior management experience.[6] Tom Calvin, a store level meat manager (and union member) who testified on behalf of Plaintiff, acknowledged that before Bob Frentzel (ultimately the successful candidate) ever arrived at the store as an Apprentice Meatcutter, and before Plaintiff ever surfaced as a legal issue, Calvin had a discussion with Fant, Howard and Dougherty, and he was advised the Apprentice Meatcutter was going to be groomed for a management position and, as a result, had some college background (TR II-186-87).

E. ***College And Managerial/Supervisory Experience.*** The evidence was undisputed that, under Dougherty's direction, Shop 'n Save has consistently required college education and managerial/supervisory experience among its management group, including store managers (TR III-225-27). Excluding pharmacists, twenty-eight (28) salaried employees were hired on or after October 29, 1990 (date of Dougherty's hire) (TR III-225; DX LL). Twenty-two (22) of the twenty-eight (28) salaried employees of Shop 'n Save hired after Dougherty (excluding pharmacists) have college and/or managerial/supervisory experience (TR III-226-27).

F. ***Shop 'n Save Contacts The Union.*** Pursuant to the terms of the then controlling bargaining agreement, before Shop 'n Save could hire an Apprentice Meatcutter, Union consent was required

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(Cont'd)
background (TR III-217). He wanted to bring an individual in, train him or her in meat the "Shop 'n Save way", ultimately grooming the individual for management (TR III-217).

6. At the time the decision was made to search for an Apprentice Meatcutter and the qualifications were set, Dougherty had no knowledge that Frentzel (ultimately the successful candidate) was searching for a job (TR II-225-26).

(TR II-52-53). Accordingly, Dougherty contacted Ed O'Reilly, President of Local 88, and informed him of the desire to hire an Apprentice Meatcutter (TR III-154, 220). Dougherty advised O'Reilly that the intention was to hire an Apprentice Meatcutter who would eventually be promoted to a management position (TR III-155). O'Reilly agreed to the hiring of an Apprentice Meatcutter on these terms (TR III-155).

G. ***Bob Frentzel.*** After the decision had been made to hire an Apprentice Meatcutter, and after the qualifications for the position had been set, Dougherty received a telephone call from an old acquaintance, Bob Frentzel, who was out of a job and looking for work (TR III-217-18). Frentzel called Dougherty with the intention to "network" in an effort to find employment (TR III-168-69). Dougherty advised Frentzel of the Apprentice Meatcutter position and upon receipt of his resume, provided it to Fant (TR III-219). Fant, after reviewing the resume, arranged for an interview of Frentzel (TR III-50, 219). Frentzel was the only candidate interviewed for the position (TR III-50, 230) — and Shop 'n Save took no steps to fill this position other than to interview Frentzel.

Frentzel was interviewed by Fant and Howard (TR III-50, 183, 197).[7] At the interview, Fant and Howard explained they were looking for more than just a meatcutter — they were looking to fill a management position ultimately with an individual with meat experience as derived from an apprentice program (TR III-50, 183). Despite Brandt's contentions to the contrary before this Court (Petition at 4), Frentzel's management and college backgrounds, together with their importance, were noted during his interview. Fant and Howard were impressed with Frentzel, who had nineteen (19) years of management experience[8] and four (4) years of college,

7. Danny Howard was a meat specialist and assistant to Bill Fant at all material times.

8. The determining factor in the decision to hire Frentzel was his management background (TR III-52). Frentzel had worked as a department (Cont'd)

thereby meeting the qualifications previously set for this position (TR III-51-52, 200). After the interview, Dougherty, Fant and Howard decided to hire Frentzel as an Apprentice Meatcutter, effective June 3, 1991 (TR III-220). Frentzel was the first and last Apprentice Meatcutter ever hired by Shop 'n Save within the jurisdiction of UFCW Local 88 (TR III-155-56).

H. ***The Decision Makers' Lack Of Knowledge Of Plaintiff's Interest.*** Neither Dougherty, Fant nor Howard knew of Plaintiff's interest in a meatcutter position which she conveyed to Butch Covili and Dick Marty in August 1990 (TR III-45, 197, 200, 222). This information had not been communicated to any of the three decision-makers who hired Frentzel for the Apprentice Meatcutter position. In June 1991, Covili was in Florida on loan to corporate Wetterau[9], and Marty had already departed the Company. Indeed, at no time did Marty ever mention or discuss this interview or correspondence with Dougherty, Fant or Howard (TR III-36-37, 45, 197, 200, 222). This evidence was undisputed. Neither Dougherty, Fant nor Howard had any knowledge of this occurrence or that Plaintiff had expressed an interest in an Apprentice Meatcutter position. In addition, Dougherty did not search the "active files" in order to seek out potential applicants for this position.

While Plaintiff argues that Danny Howard knew of her desire to become a female Apprentice Meatcutter (Petition at 2, 6), as with respect to other contentions made by Brandt, this contention

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(Cont'd)
foreman, supervising three (3) to fifteen (15) employees represented by the United Steel Workers, as a Corporate Vice-President of Purchasing, maintaining responsibility over three (3) plants and a budget of sixteen (16) to eighteen (18) million dollars, and as a plant manager, supervising fifty (50) union production workers (TR III-173-78; PX 47).

9. Thus, despite Brandt's contention (Petition at 5), Covili's "knowledge" is of no importance since he shared it with no one and was not a decisionmaker in this matter.

is not supported by the record. Between 1987 and 1991, Plaintiff had numerous conversations with Howard about opportunities with Shop 'n Save — she worked there as a casual wrapper and was interested in being hired by Shop 'n Save as an employee (regular meatwrapper) (TR II-22, 102). Plaintiff, however, testified that she had *only one* conversation with Howard about the subject of Apprentice Meatcutter and this occurred in late 1989 or early 1990 (TR II -104-105). The substance of the conversation did *not* concern becoming an Apprentice Meatcutter — but rather, concerned whether Shop 'n Save might someday institute an apprentice program (TR II-104-05). Plaintiff adduced no evidence to impeach/ contradict the decisionmakers' testimony that they were unaware of her interest in this position.

Assuming *arguendo*, that Plaintiff's one conversation with Howard is at issue, such is not "substantial evidence upon which a reasonable jury" might have relied: According to Plaintiff, this conversation occurred 15 to 21 months prior to Frentzel's hire; in the normal realm of human affairs, this one conversation would not have "stuck out" in view of Plaintiff's four year crusade and numerous conversations with Howard to be hired as a regular meatwrapper; moreover, in view of the hundreds of people with whom Howard converses in a week (TR III-198), there is nothing about this remote and isolated conversation which would be expected to "stick with him" many months later.

I. *Brandt Becomes A Legal Issue.* Upon learning of the hire of Frentzel, on June 3, 1991, Plaintiff visited Dougherty and advised him of her previous visit with Marty (TR II-68; III-228-30). Plaintiff walked into his office and announced, "In case you didn't notice, I'm a female" (TR III-229). Plaintiff complained about not being considered for the position filled by Frentzel and told Dougherty she had applied (TR III-229). At this time, Dougherty had the appropriate files searched, but her application could not be located (TR II-68, 118; III-229-30). Dougherty explained he had no knowledge of her application or of her previous discussion with Marty (TR II-117-19). He further advised Plaintiff, however, that

they were looking to groom someone for management (TR II-119) and, as a result, even had she been considered, she lacked the qualifications necessary for the particular position since Plaintiff had no college education and no management experience. Plaintiff acknowledged this is what she was told when she confronted Dougherty for the first time about the hire of Frentzel (TR II-68). There is no dispute but that Plaintiff lacked college and managerial experience (TR II-95,120).

J. ***Hindsight: Frentzel's Lack Of Progress Up The Management Chain.*** Brandt attempts to make an issue (Petition at 5) out of the fact that at the time of trial, Frentzel had completed the Apprentice Meatcutter program, but had not yet become a manager of any type (TR 185-86; 260). Since June 1991, however, Fant explained the vast changes directly affecting the meat industry. Meat is no longer primarily being cut on site at grocery stores, but is being cut at the packing plants and sent to the grocery stores pre-packaged and vacuum-packed, thereby directly impacting the amount of work available in the meatcutting industry (TR III-58). As a result, the Company experienced a cut back in management staff in the meat area since the hire of Frentzel (TR III-58). Among other changes, when the ownership of Shop 'n Save changed, restructuring occurred, which involved, among other things, the demotions of two (2) meat specialists to store level meat managers (TR III-58-59). In fact, since the hire of Frentzel, only two (2) store level meat manager positions have been filled (TR III-61). Joe Sarillo was selected for the management position over Frentzel because he had thirty (30) years of experience in the meat industry and had been relieving the head meatcutter at the Ellisville store (TR III-61). Tim Clancy was selected over Frentzel because of the time he had spent at the largest store of Shop 'n Save and had also relieved the head meatcutter there (TR III-61).

K. ***The Meatcutter And Meatwrapper Job Classifications.*** Historically, the positions of meatcutter and meatwrapper (now known as "meat clerk") were different. The occupants of these positions performed different duties. While Brandt argues that, as

a meatwrapper/meat clerk, she performed the duties of a meatcutter (and hence, by inference, was "qualified" to be hired as an Apprentice Meatcutter), the truth of the matter is that the duties and responsibilities of meatwrappers/meat clerks did not begin to resemble the duties of a meatcutter until the time of the September, 1993 change in the collective bargaining agreement (TR II-38-39). Thus, in June of 1991, Plaintiff's skills and abilities did not come even remotely close to resembling the skills and abilities of a meatcutter.

As indicated by Brandt, her UFCW Local 88 reflected a membership of between 600 and 650 meatcutters (Petition at 2). Inasmuch as there were only three (3) or four (4) female meatcutters within the jurisdiction — and Shop 'n Save employed one (1) of these females — Brandt can hardly complain about alleged "sex segregated" job classifications (Petition at 2).

L. ***Preselection And Pretext.*** Before the Eighth Circuit (Brief for Appellant at 25) Shop 'n Save articulated its legitimate, nondiscriminatory rationale as follows:

> Defendant was . . . entitled to Judgment as a Matter of Law because it demonstrated two legitimate, nondiscriminatory reasons for the denial of promotion which Plaintiff failed to prove were pretextual: the decisionmakers did not know she had applied and, even had they known, she did not meet the established qualifications.

Throughout this case, Brandt has argued that this case was a "preselection case", *i.e.* that Defendant decided to hire Bob Frentzel and then crafted job qualifications that he could satisfy. For example, in closing argument, Brandt argued this theme of preselection (TR IV-63; Respondent's Appendix A, pp. 1a-3a). In Brandt's Brief to the Eighth Circuit, Brandt again argued that Frentzel was preselected for the job and that the qualifications were thereafter

tailored with his resume in mind (Brandt's Brief at 16; Respondent's Appendix B, p. 4a). Brandt has argued this same point of "preselection" to this Court (Petition at 18).

The Eighth Circuit agreed with Brandt's theory of the case, and now **she is unhappy with her success**! The Eighth Circuit held as follows (Petitioner's Appendix at A-7 and 8):

> We have carefully reviewed the record in this case, and we are confident that the jury might easily have found that Shop 'n Save — Dougherty specifically, with Fant's assistance — created the Apprentice Meatcutter position and its qualifications with the express purpose of hiring Frentzel to fill it, that is, that Shop 'n Save's proffered "legitimate reason" was a fabrication, a pretext for its true reasons. We are so persuaded ourselves.
>
> . . . It is apparent that the position was created for Frentzel, with the job's "qualifications" tailored to Frentzel's background, rather than that Frentzel coincidentally and fortuitously happened into a just-created position that required his "qualifications."

Thus, on this state of record, Shop 'n Save is forced to concede *arguendo*, that the facts outlined above in Sections D and G must be inverted for purposes of analysis. In other words, as to which came first — Frentzel — or the Apprentice Meatcutter position — the Eighth Circuit has spoken (pursuant to Brandt's lead) and, for these purposes Frentzel came first — and the Apprentice Meatcutter position was thereafter created. While this conclusion does not square with the truth or with the record created in this case, for purposes of analysis, it is the law of this case.

While the Eighth Circuit viewed as pretextual Shop 'n Save's explanation that Plaintiff was not qualified for the Apprentice Meatcutter position (on the theory that Frentzel was preselected for the job) it is noteworthy that there has never been any finding that the second prong of Shop 'n Save's explanation was anything but accurate, *i.e.* that the decisionmakers did not know that Brandt had applied for the position.

The Proceedings Below

Brandt filed her EEOC/MCHR Charge on June 17, 1991, contending that she had been denied the position of Apprentice Meatcutter because of her sex. (PX-14). On February 29, 1992, the EEOC determined that Brandt had not been denied the Apprentice Meatcutter position because of her sex (DX-R).

Plaintiff Kim Brandt filed her Complaint (App. 9-13) on May 28, 1992, alleging her employer, Shop 'n Save, had discriminated against her on the basis of her sex in denying her a promotion to Apprentice Meatcutter in June 1991, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.111. Plaintiff also alleged she was denied full-time work opportunities in retaliation for filing a Charge with the Equal Employment Opportunity Commission ("EEOC"), also in violation of Title VII and the MHRA.

The matter was tried in October of 1994, with the trial on the amount of punitive damages bifurcated.[10] At the conclusion of Plaintiff's evidence, and at the conclusion of all evidence (App.

10. The trial court reserved a pre-trial ruling on the Motion to Bifurcate. Yet, Plaintiff closed her case in chief without adducing (or attempting to adduce) any evidence as to Defendant's net worth for assessment of punitive damages. At the jury instruction conference, the court addressed this error of Plaintiff by "granting" Defendant's Motion to Bifurcate, thereby permitting Plaintiff to introduce such evidence during the second phase of the trial, should the jury make a finding of malice based upon the initial phase of trial.

115-18; TR III-30-37), Motions for Judgment as a Matter of Law were denied (TR III-137, TR IV-13-14). The jury returned a verdict for the Plaintiff on her claim of denial of promotion to the position of Apprentice Meatcutter and awarded her $22,330.93 for lost wages and benefits (App. 202-03). With respect to Plaintiff's claim for punitive damages, the jury found Defendant's conduct was outrageous, and despite the bifurcation as to the amount of punitive damages, the jury jumped the gun and hand-wrote at the bottom of the verdict form the following:

> PUNITIVE DAMAGES: $35,000.00 PLUS DEFENDANT PAYS ALL THE PLAINTIFF'S LEGAL FEES.

The jury found in favor of Defendant on Plaintiff's claim of retaliation (App. 204-05).

On August 14, 1995, United States Magistrate Terry I. Adelman entered Judgment for Plaintiff on her claim of promotion denial — and in favor of Defendant on the retaliation claim (at 142-55). In entering Judgment for Plaintiff on her promotion denial claim, Judge Adelman relied heavily on the proposed Findings of Fact and Conclusions of Law submitted by Brandt — and, in any event, whatever his true beliefs, he was bound to draft his Findings of Fact and Conclusions of Law in the light most favorable to Plaintiff. *Garza v. City of Omaha*, 814 F.2d 553, 43 FEP 572 (8th Cir. 1987); and *Ways v. City of Lincoln*, 871 F.2d 750, 49 FEP 865 (8th Cir. 1989).

Shop 'n Save's appeal presented a number of meritorious issues — some of which required entry of Judgment for Shop 'n Save — and others of which required a new trial (Respondent's Appendix C, pp. 5a-7a). For instance, Shop 'n Save argued that it was entitled to Judgment as a Matter of Law in view of Plaintiff's failure to submit a *prima facie* case of sex discrimination. Despite Brandt's misrepresentation to this Court, the Eighth Circuit majority did not "concede" that Brandt established a *prima facie* case of sex

discrimination (Petition, at 6). Instead, in view of Shop 'n Save's entitlement to Judgment as a Matter of Law, the Eighth Circuit merely assumed, *arguendo*, the existence of a *prima facie* case (Petitioner's Appendix, A-6):

> Because we conclude as a matter of law that Brandt did not prove her gender was a motivating factor in Shop 'n Save's decision to hire Frentzel instead of her, we do not consider the changed aspects of the *prima facie* case. We assume for purposes of this appeal that Brandt proved a *prima facie* case of sex discrimination by a preponderance of the evidence.

The court also found it unnecessary to address Shop 'n Save's other points on appeal (Petitioner's Appendix, A-9):

> Shop 'n Save raises a number of other issues in its appeal. Because of our disposition of the first issue, it is unnecessary for us to consider those that remain.

The Eighth Circuit reversed, and entered Judgment for Shop 'n Save, reasoning as follows (Petitioner's Appendix, A-7, 8 and 9):

> . . . . We do not believe that Brandt has met her burden of proving that the pretext was intended to conceal unlawful discrimination or that her gender in any way motivated the hiring of Frentzel instead of Brandt. The "fact sensitive" issue at this stage of the analysis is "whether the employee has provided evidence from which a reasonable factfinder could conclude that the Employer intentionally discriminated against the

> employee for a prohibited reason." [citation omitted]. We hold that she has not.
>
> . . . . No reasonable jury could have found that Frentzel was hired to the exclusion of Brandt because Brandt is female [citation omitted]. Shop 'n Save thus is entitled to Judgment as a Matter of Law.
>
> This is a case "where the evidence of pretext is inconsistent with an inference of intentional discrimination". . . Of course, Brandt was free to "rely on the same evidence to prove both pretext and discrimination", but that does not prevent our reversal of the denial of Shop 'n Save's Motion for JAML where "the evidence is insufficient for a reasonable finder of fact to infer unlawful discrimination."

Brandt sought Rehearing and Rehearing *En Banc*. Rehearing *En Banc* was denied by a vote of 8 to 3, with Rehearing denied by Judge Bowman (the author of the underlying Opinion), Judge Wollman (who joined Judge Bowman in the primary Opinion) as well as by Judges Fagg, Magill, Beam, Loken, Murphy and Morris S. Arnold.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT BETWEEN THE CIRCUITS ON THE ISSUE OF WHETHER JUDGMENT AS A MATTER OF LAW FOR AN EMPLOYER CAN NEVER BE APPROPRIATE IN A DISCRIMINATION CASE WHERE AT LEAST ONE OF THE EMPLOYER'S LEGITIMATE, NONDISCRIMINATORY REASONS IS REJECTED AS UNTRUE.

Brandt contends that *certiorari* should be granted because of a conflict between the Circuits as to the true meaning and application of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 62 FEP 96 (1993). Stripped of excess verbiage, Brandt contends *Hicks* stands for two (2) related propositions in the factual scenario where Plaintiff has adduced *prima facie* case evidence, plus evidence of untruthfulness of the Employer's articulated rationale: **first**, that JAML for an Employer can **never** be appropriate; and **second**, that the FRCP 50(a)(1) duty to ascertain whether a "reasonable jury" could have found for Plaintiff, has been, *sub silentio*, repealed. Brandt contends the Circuits are split on this supposed application of *Hicks*. Moreover, Brandt contends that the Eighth Circuit's Opinion in this case "is uncomplicated and presents the problem in a clear, straightforward manner." (Petition at 9). Upon analysis, no split in the Circuits exists — FRCP 50(a)(1) has not been repealed — and assuming, falsely, but *arguendo*, that a split exists, this case does not present the split in a clear, straightforward manner, but rather, in a peculiarly factual manner.

A. The Hicks Rationale

In *Hicks*, this Court spelled out the possibilities for a Title VII Plaintiff who had presented a *prima facie* case *and* who had demonstrated the employer's legitimate, nondiscriminatory rationale to be untrue. The Eighth Circuit, below, had opined that such proof compelled Judgment as a Matter of Law for Plaintiff.

This Court reversed, providing guidance for parties placed in this same procedural posture of *prima facie* case, with untruthful rationale.

The linchpin of *Hicks*, quoted twice, (509 U.S. at 507 and 518, 62 FEP at 99 and 103) was derived from *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP 113, 115 (1981) as follows:

> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

This Court, therefore, squarely held that a *prima facie* case, with pretext, was *not* sufficient to require Judgment as a Matter of Law for Plaintiff since:

> It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination. [emphasis original]

Hicks, *supra* at 509 U.S. 519, 62 FEP at 104. Holding that Judgment as a Matter of Law is **never required** for a Plaintiff in the presence of mere *prima facie* case, with pretext, this Court defined legally required pretext:

> . . . A reason cannot be proved to be a "pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. [emphasis original]

Hicks, *supra*, 509 U.S. at 515, 62 FEP at 102. With this definitional background, this Court specified the two (2) procedural possibilities for a Plaintiff, who has submitted a

prima facie case and who has adduced evidence of untruthfulness of the employer's articulated rationale: The **first** procedural possibility is that the case is sent to the jury which is *permitted* to infer (or not) intentional discrimination:

> The factfinders' disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . .

Hicks, supra, 509 U.S. at 511, 62 FEP at 100. The **second** possibility is that (as in the *Hicks* proceedings in the District Court) Judgment will be entered for the Defendant in view of the absence of a finding of intentional discrimination:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review — which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). . . .

Hicks, supra, 509 U.S. at 524, 62 FEP at 106.[11]

Hicks thus sets forth the following paradigm where a Title VII

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11. In bench tried cases, like Hicks, the finding (or not) of discrimination is subject to the "clearly erroneous" standard of review. FRCP 52(a). In jury tried cases, the "reasonable jury" standard is utilized. FRCP 50(a)(1).

Plaintiff has submitted a *prima facie* case, with evidence that the Defendant's legitimate, nondiscriminatory rationale is untrue: The factfinder is **permitted**, but not required, to find for the Plaintiff; if the factfinder rules for the Plaintiff, then Judgment as a Matter of Law (either in the District Court or in the Court of Appeals) is appropriate for Defendant where no reasonable jury, FRCP 50(a)(1), could conclude Defendant intentionally discriminated against the Plaintiff.

While Brandt contends that there is a split in the Circuits as to the "true meaning" of *Hicks*, a review of the caselaw cited by Brandt actually demonstrates that the Courts have followed the foregoing analysis, sometimes resulting in victories for Plaintiffs on appeal — and sometimes resulting in victories for Defendants on appeal — all due to the facts of the cases. FRCP 50(a)(1) is still in the Rules of Civil Procedure!!

B. Brandt Applies Hicks

In this case, since it was a jury case, rather than a *Hicks* bench case, the Eighth Circuit applied the "reasonable jury" standard, rather than the "clearly erroneous" standard of review. Quoting *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1334, 71 FEP 1458, 1461 (8th Cir. 1996), in follow-up on the *Hicks* mandate of appellate review, the *Brandt* panel posed the issue as follows:

> The "fact sensitive" issue at this stage of the analysis is "whether the employee has provided evidence from which a reasonable factfinder could conclude that the employer intentionally discriminated against the employee for a prohibited reason" . . . . We hold that she has not.

Brandt v. Shop 'n Save Warehouse Foods, Inc., 108 F.3d 935, 938, 73 FEP 652, 655 (8th Cir. 1997) (Petitioner's Appendix A-7).

The *Brandt* court reached this result by following Brandt's lead that the preferred candidate (Frentzel) had been "preselected" due to his friendship with Dougherty — and hence Shop 'n Save's argument that Brandt was not qualified for the job was pretextual since the qualifications were constructed with Frentzel specifically in mind:

> The evidence shows that Frentzel took advantage of his "network" to land the Apprentice Meatcutter position, and that Dougherty obliged his friend by supporting his application for the position, if not creating a tailor made position for Frentzel. We do not condone the exclusion of Brandt as a viable candidate on this basis. But it is not intentional sex discrimination for Dougherty to hire an unemployed old friend who happens to be male, without considering an applicant who is neither unemployed nor an old friend and happens to be female . . . No reasonable jury could have found that Frentzel was hired to the exclusion of Brandt because Brandt is female.

Brandt, *supra*, at 108 F.3d 938, 73 FEP at 655 (Petitioner's Appendix at A-7 and 8). Following up on *Ryther v. KARE 11*, 108 F.3d 832, 73 FEP 373 (8th Cir. Banc), *cert. denied*, __ S. Ct. __, 1997 WL 181004, 65 USLW 3694 (1997), *Brandt* then concludes by holding as follows:

> This is a case "where the evidence of pretext is inconsistent with an inference of intentional discrimination" [citing *Ryther*] of course, Brandt was free to "rely on the same evidence to prove both pretext and discrimination," but that does not prevent our reversal of the denial of Shop 'n Save's

> Motion for JAML where "the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination." [quoting *Ryther*].

Brandt, 108 F.3d at 939, 73 FEP at 655-56 (Petitioner's Appendix at A-9).

Thus, the case at bar does nothing more than apply traditional standards of "appellate review", as mandated by *Hicks*. In the case at bar, Plaintiff's argument of preselection negated any possible inference of intentional sex discrimination and the Eighth Circuit merely held that no reasonable jury could have concluded otherwise.

C. No Split In The Circuits

The caselaw cited by Plaintiff, does not demonstrate a split between the Circuits in interpreting the "true meaning" of *Hicks*. Instead, the cases[12] are easily analyzed and harmonized in four (4) categories:

1. The Absence Of A Prima Facie Case And/Or Evidence Of Pretext.

Several of the cases cited by Brandt, allegedly demonstrative of a split in the circuits, are actually cases where Plaintiff failed to submit a *prima facie* case and/or evidence of pretext for intentional discrimination. *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1318, 63 FEP Cases 816, 821 (4th Cir. 1993), for example, held as follows:

> Because Mitchell failed to establish a *prima facie* case and failed to carry the ultimate

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12. *Gilligan v. Martin*, 81 F.3d 835, 70 FEP 856 (9th Cir. 1996) has nothing to do with the issues herein discussed, but rather concerns the issue of whether an Affirmative Action Plan can serve as a defense in a reverse discrimination case.

> burden of persuasion in the face of the employer's nondiscriminatory explanation by establishing a genuine issue of material fact in connection with the explanation, we affirm the Summary Judgment entered by the District Court in favor of Data General.

In *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084, 65 FEP Cases 585, 589 (6th Cir. 1994) Plaintiff failed to adduce any evidence of the untruthfulness of the Defendant's articulated rationale for his termination:

> In the present case, Manzer contends that the same evidence which created a jury question on his *prima facie* element of "qualification" was also sufficient to permit a reasonable juror to reject Diamond Shamrock's proffered explanations as "phony". The District Court held, and Manzer does not dispute, that he presented no evidence that his employer's explanations were "factually false".

Woods v. Friction Materials, Inc., 30 F.3d 255, 262, 65 FEP Cases 1109, 1114 (1st Cir. 1994) is another case where Plaintiff failed to present evidence of pretext:

> Because Woods has failed to present sufficient evidence to permit a reasonable factfinder to infer that FMI's articulated reason was a pretext for unlawful age discrimination, his claim under ADEA must fail.

Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 72 FEP Cases 1635 (7th Cir. 1997) simply affirms Summary Judgment for the Defendant on the basis that Plaintiff failed to submit a

prima facie case. *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 72 FEP 1603 (6th Cir. 1997) is just the converse: the District Court's entry of Judgment for the Employer for lack of a *prima facie* case was reversed since the Sixth Circuit was convinced of the existence of a *prima facie* case.

2. The FRCP 50(a)(1) "Reasonable Jury"

Disregarding the cases discussed above at (1.) (which have no bearing upon the issue at hand) most of the cases cited by Plaintiff involve an application of FRCP 50(a)(1) and its "reasonable jury" standard of review. *Hicks* made it clear that the factfinder's findings in a discrimination cases (like any other case), are subject to "appellate review" — since Brandt was a jury tried case, the "reasonable jury" standard was utilized. FRCP 50(a)(1).[13] Thus, where Plaintiff has submitted a *prima facie* case and has demonstrated that the employer's articulated rationale was not truthful, the appellate court must conduct a "fact intensive . . . case by case" review to determine whether a reasonable factfinder might properly have inferred intentional discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d at 1335, 71 FEP at 1462; *see* also *Ryther*, 108 F.3d at 838, 73 FEP at 376; and *Brandt*, 108 F.3d at 938, 73 FEP at 655 (Petitioner's Appendix at A-7).

The bulk of the caselaw cited by Brandt, categorized as "pretext only" cases and/or "pretext plus" cases are really nothing more than cases subjecting the evidence to a "fact intensive . . . case by case" review, focused upon the question of whether, based upon the evidence, a reasonable jury might have found intentional discrimination.

For example, *Fisher v. Vassar College*, 114 F.3d 1332, 1334-

13. In other words, an Appellate Court must enter JAML for a Defendant, denied by the District Court, where no "reasonable jury" could have entered Judgment for Plaintiff. *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir.), *cert. denied*, 450 U.S. 981 (1980); *Resolution Trust Corp. v. Cramer*, 6 F.3d 1102 (5th Cir. 1993).

35, 1338, 74 FEP 109, 112, 115 (2nd Cir. Banc 1997) was bench tried (rather than jury tried), but, with this FRCP 50(a)(1)/FRCP 52(a) standard of review distinction, is nevertheless illustrative. Therein, a *prima facie* case, as well as evidence of untruthfulness was submitted; the District Judge entered Judgment for Plaintiff. The Second Circuit, sitting *en banc*, after an intensive review of the record, found insufficient evidence of intentional discrimination, and entered Judgment for the Defendant:

> [Judgment for Plaintiff] . . . may be reversed — even if there is a sustainable finding of pretext — if the evidence, considered in the aggregate, will not support a finding by the District Court that the reason for the adverse employment action was intentional discrimination . . .
>
> * * *
>
> The sufficiency of the finding of pretext to support a finding of discrimination depends on the circumstances of the case. This is an unremarkable principle: the sufficiency of any evidentiary finding depends on the other findings and evidence that accompany it.

Walker v. NationsBank of Florida, 53 F.3d 1548, 1558, 68 FEP 314, 321 (11th Cir. 1995) involved a Plaintiff who had submitted a *prima facie* case, as well as evidence which bore upon the truthfulness of the articulated rationale, yet, nevertheless, saw JAML entered for the Defendant at the close of Plaintiff's case. After a careful review of the facts, the Eleventh Circuit believed that "bad blood", rather than age or sex, motivated the termination and held as follows:

> Reasonable and fair minded persons, in the exercise of impartial judgment, would not

> conclude that the bank had discriminated against Walker on either the basis of her age or sex. We therefore affirm the District Court's entry of a directed verdict in favor of the bank.

In other cases, Courts of Appeal have concluded that a "reasonable jury" could have found intentional discrimination. *See EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 66 FEP 1102 (2nd Cir. 1994) (against the background of *prima facie* case and evidence of untruthfulness of rationale, sufficient evidence existed for a reasonable jury to reach a conclusion of intentional discrimination); *Barbour v. Merrill*, 48 F.3d 1270, 1277, 67 FEP 369, 373 (D.C. Cir. 1995) ("the jury could have reasonably concluded that *Barbour* had proven unlawful discrimination"); and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 995, 69 FEP 1720, 1723 (5th Cir. Banc 1996), n.6, ("the evidence . . . [was] sufficient for a reasonable factfinder to infer that the employer's decision was motivated by a discriminatory animus").

One of the cases primarily relied upon by Brandt, actually harmonizes the existing caselaw. *Sheridan v. E.I. DuPont DeNemours & Co.*, 100 F.3d 1061, 1068, 72 FEP 518, 524 (3d Cir. Banc 1996), n.7, *cert. denied*, __ S. Ct. __, 1997 WL 49784, 65 USLW 3571 (U.S. 1997). Therein, the Seventh Circuit, sitting *en banc*, reviewed Seventh and other circuit opinions where a *prima facie* case was presented, as was evidence of untruthfulness of the rationale, where verdicts for Plaintiffs were upheld on appeal. The Seventh Circuit, on the facts of *Sheridan*, reversed Judgment as a Matter of Law for the employer on the constructive discharge claim, finding that a "reasonable jury" might well have found an illegal, constructive discharge. The majority harmonized several cases cited by its dissent (some of which were cited by Brandt as allegedly demonstrative of a split in the circuits) as follows:

> It is of interest that of the four (4) cases from other Circuits cited by the dissent as "strong

> contrary authority", in three the actual holding was that the Plaintiff "failed to present sufficient evidence to permit a reasonable factfinder to infer that [the Defendant's] articulated reason was a pretext for unlawful . . . discrimination."

While Eighth Circuit caselaw was, in the past, not always a model of consistency, *Rothmeier*, followed by *Ryther* and *Brandt*, articulate well that current Eighth Circuit thinking is in conformity with the foregoing analysis. *Rothmeier*, 85 F.3d at 1335, 71 FEP at 1462, recognized that a *prima facie* case, with evidence of pretext, will support a Plaintiff's verdict where, based upon a "fact intensive . . . case by case" determination, the evidence is sufficient to "allow a reasonable factfinder to conclude that the Defendant has intentionally discriminated against the Plaintiff." *Ryther*, 108 F.3d at 837, 73 FEP at 376 has applied this "reasonable juror" rule as follows:

> We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.
>
> * * *
>
> fn.2 . . . evidence of pretext *does not always* support an inference of intentional discrimination. As we note, there may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination.

In the case at bar, the *Brandt* panel merely found that Plaintiff's evidence of preselection, *i.e.* that Dougherty wanted to hire an old

friend and tailored a job especially for him was, based upon the evidence, inconsistent with an inference of sex discrimination.

Thus, caselaw is not demonstrative of a split within the circuits, but rather is demonstrative of the "unremarkable principle", *Fisher*, 114 F.3d at 1338, 74 FEP at 112, that every case is decided upon its own peculiar facts.

3. FRCP 56 Summary Judgment Cases

Brandt also cites several FRCP 56 Summary Judgment Cases where the record was inadequately developed to allow Summary Judgment for an employer to be upheld — given the presence of the *prima facie* case, with some evidence of untruthfulness. In several of the cases cited by Brandt as allegedly demonstrative of a split within the circuits, employers were prematurely granted Summary Judgment. In other words, in these cases, Plaintiffs submitted *prima facie* cases, together with some evidence of untruthfulness of the legitimate, nondiscriminatory rationale. Nevertheless, the District Courts granted Defendants Summary Judgment. Several Courts of Appeal have reversed in this procedural posture, based primarily upon an undeveloped record. For example, in *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 921, 63 FEP 838, 843 (11th Cir. 1993) the court held as follows:

> . . . Plaintiff's burden at Summary Judgment is met by introducing evidence that could form the basis for a finding of facts, which taken in the light most favorable to the non-moving party, could allow a jury to find a preponderance of the evidence that the Plaintiff has established pretext, and that the action taken was in retaliation for engaging in the protected activity. Issues of fact and sufficiency of evidence are properly reserved for the jury. The only issue to be considered by the Judge at Summary Judgment is

whether the Plaintiff's evidence has placed material facts at issue.

Summary Judgment cases and Judgment as a Matter of Law cases arise in a totally different procedural posture.[14] Summary Judgment cases are matters of foresight, based upon an undeveloped record. Judgment as a Matter of Law cases are matters of hindsight, based upon a review of an entire trial transcript. District Courts (and Courts of Appeal) are therefore, much more reluctant to enter (or uphold) Summary Judgment for employers in undeveloped employment discrimination cases since proof of subjective intent goes to the heart of the claim.

As indicated in *Hairston*, certain issues are properly reserved for the jury and should not, pre-trial, be circumvented by Summary Judgment. Neither *Hairston*, nor any of the Summary Judgment cases cited by Brandt, purport to modify the post-trial "reasonable jury" standard of FRCP 50(a)(1) — nor do they attempt to overrule the *Hicks* mandate that normal appellate review is always available. In a post trial setting, *Hicks* indicates that appellate review proceeds according to the usual standards, *i.e.* the "reasonable juror" standard.

Several of the cases cited by Plaintiff are simply cases of prematurely granted Summary Judgment. *See Batey v. Stone*, 24 F.3d 1330, 65 FEP Cases 1161 (11th Cir. 1994); *Perdomo v. Browner*, 67 F.3d 140, 68 FEP Cases 1751 (7th Cir. 1995); and *Washington v. Garrett*, 10 F.3d 1421, 63 FEP Cases 540 (9th Cir. 1993). Consequently, they are not illustrative of Brandt's proposition that an appellate court lack the authority provided under FRCP 50(a)(1).

4. The Eleventh Circuit

The overwhelming majority of the caselaw cited by Plaintiff, allegedly demonstrative of the split between the circuits is easily

14. *See Isenbergh, infra*, 97 F.3d at 443, 72 FEP at 741, n.4 which recognizes the practical and legal distinction.

handled: a few of the cases deal with the presence or absence of a *prima facie* case and/or evidence of untruthfulness; most of the cases are factually intensive transcript reviews to determine whether a "reasonable jury" might reasonably have inferred intentional discrimination from the record evidence of *prima facie* case and untruthfulness of rationale; finally, a few of the cases are simply cases of prematurely granted Summary Judgment where the record evidence had not yet been well enough developed. Thus, the caselaw of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits do not adhere to the proposition that Brandt would foist upon Employers, *i.e.* that Judgment as a Matter of Law can **never** be appropriate in a discrimination case, where at least one (1) of the employer's legitimate, nondiscriminatory reasons is rejected as untrue. Such a rule would repeal FRCP 50(a)(1) and overrule *Hicks*.

Two (2) of the Judges of the Eleventh Circuit (Birch and Carnes), however, apparently agree with Brandt. *See Combs v. Meadowcraft, Inc.*, 106 F.3d 1519, 1538, 73 FEP 232, 245 (11th Cir. 1997). This does not, however, warrant a grant of *certiorari* herein, for all it presents is, at best, an intra-circuit conflict where the court *en banc* has not yet had the opportunity to resolve the issue. The usual rule applied elsewhere within the circuits was articulated by another Eleventh Circuit Panel in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 441, 442, 72 FEP 735, 739, 740 (11th Cir. 1996). Therein, Judgment as a Matter of Law was granted for the employer and Plaintiff presented essentially the same argument as does Brandt herein, *i.e.* JAML is never appropriate where Plaintiff has submitted a *prima facie* case and has adduced some evidence of untruthfulness of the Defendant's articulated rationale. The Court succinctly rejected this contention:

> This case is about Rule 50. Isenbergh argues that never can an employer be entitled to a Judgment as a Matter of Law in an employment discrimination case if the evidence is sufficient to allow the jury to

> disbelieve the employer's proffered reason for the employment action.
>
> * * *
>
> . . . We have no confidence that the *Hicks* decision dictates to Circuit and District Judges, or even was intended to suggest, that every time the evidentiary record in a case could support a jury's disbelief of the employer's explanation for the pertinent action, no Court may grant a Motion for Judgment as a Matter of Law to the employer. . . .

Thus, *Combs*, at best, presents only an intra-circuit conflict with *Isenbergh*. Inasmuch as the Eleventh Circuit, *en banc*, has not spoken to this issue,[15] it would be premature to declare that a split within the circuits exist. Instead, two (2) Judges from the Eleventh Circuit have deviated from the rulings within their own circuit, hardly creating an *important* issue for Certiorari.

II. BRANDT IS ESTOPPED TO COMPLAIN THAT THE EIGHTH CIRCUIT FOUND THE ABSENCE OF INTENTIONAL DISCRIMINATION WHERE IT DID SO THROUGH EXPRESS RELIANCE UPON PLAINTIFF'S ARGUMENT THAT THE SUCCESSFUL CANDIDATE WAS THE BENEFICIARY OF PRESELECTION.

Shop 'n Save's evidence at trial was that it created the Apprentice Meatcutter position in order to groom the successful candidate for a management position — and shortly thereafter learned of Bob Frentzel's availability (knowing full well his history of college and management). At trial and before the Eighth Circuit, Brandt urged just the converse, *i.e.* that John Dougherty learned of

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15. The Second, Third, Fifth and Eighth Circuits have spoken *en banc*.

Frentzel's availability — and Shop 'n Save, thereafter, tailored the Apprentice Meatcutter position's qualifications precisely to fit Frentzel's resume. The Eighth Circuit agreed with Brandt that Frentzel had been preselected and rejected and reversed Shop 'n Save's chronology. Plaintiff now bitterly complains that the Eighth Circuit adopted her theory of the case!

This issue is obviously not worthy of Certiorari, for two (2) reasons: **First**, Plaintiff has failed to cite any caselaw — much less a split within the circuits — which precludes a court from adopting a litigant's own theory and then from using it against that litigant; **Second**, there is obviously no importance to this issue which is purely personal to Brandt who is unhappy that her case handling tactics have "boomeranged" against her.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

MICHELLE M. CAIN
Counsel of Record
ROBERT W. STEWART
SHELLEY M. ROITHER
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
Attorneys for Respondent
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131-3039
(314) 567-7350

APPENDIX A — EXCERPTS FROM PETITIONER'S REBUTTAL ARGUMENT AT THE DISTRICT COURT

REBUTTAL ARGUMENT

BY MR. MOENCH:

MR. MOENCH: Ladies and gentlemen, it may be interesting what Mr. Stewart believes, but what he believes is not evidence. He just told you he believes the Defendant deserves a verdict, that is not worth any credible evidence, and I ask you to ignore that comment of what he believes. He's paid to believe what he believes. Just like Bill Fant and Danny Howard and John Dougherty are paid by the Defendant. There are a number of points that Mr. Stewart made with you that I want to address. First of all, he attacked Kim's credibility, Kim Brandt's credibility. One of the problems he had was that she wrote the word "female," before apprentice meat cutter in her letter to Dick Marty and her letter to Butch Covili. I asked you to look at those letters, look at the two letters and look at the dates, they were both written on August 17, the wording is similar in both. I believe that'll explain by itself why Kim put the word "female," before apprentice meat cutter. She was letting Dick Marty know what was going on, and she was copying Butch Covili with the letter she sent Marty. Next, he attacks her because she said Chippewa is 2 miles further away from her home in Wood River, than Collinsville. And he put on a witness to prove her wrong, and you know what that witness said? It's 3 to 4 miles further from Wood River to Chippewa than it is to Collinsville. I submit that's not a real significant fact with which he impeached Ms. Brandt's credibility. Ladies and gentlemen, we don't even know where in Wood River Ms. Brandt lives, I don't think that's worth any impeachment value of Kim's testimony. And if they're that desperate to impeach our Plaintiff, I submit they're in pretty bad shape. Now, I also want you to look carefully at these

instructions. Mr. Stewart seemed to imply that we were asking you to give Kim money because since 1987 Danny Howard had been telling her he wanted to hire her on full-time. Look at these instructions, nowhere in there is Kim asking you for any money damages because of that. The money damages she's asking you for are the denial of the apprentice meat cutter job and the damage she suffered as a result of the retaliation after her EEOC charge. Now, he also made a point of his fishing expedition. First of all, I don't know how you'd know if you caught a female fish, but that's beside the point. The point is that when you have a field of male meat cutters it's unusual for a female to come in and file an application. In fact, none of the Defendants that testified about it could tell you of one other female who ever applied. That tells me it must have meant something to Danny Howard when Kim said, "I want to be an apprentice meat cutter". I think that's the significance of that fact. Now, Mr. Stewart also told you that Kim's here to take Bob Frentzel's job away from him. Nothing could be further from the truth. Bob Frentzel is not gonna lose his job if Kim Brandt wins this lawsuit. Then he also read to you from the instructions, but I'm gonna ask you again, to read these instructions carefully, because he added some words to it. He said that you'll be instructed that,

> "Your verdict will be for Plaintiff if you find first, Defendant failed to award Plaintiff an Apprentice Meat Cutter position,"

and he admitted we've proved that. And second,

> "That Plaintiff applied for and was qualified for the position".

Here's where we added some words, "That the Defendant had

designed," that doesn't appear in these instructions, ladies and gentlemen. That's their whole defense to this case, that they designed this Apprentice Meat Cutter position with Bob Frentzel specifically, — or with management specifically in mind. The instruction does not say it. About college hours, I have to admit, I can't tell you today how many college hours I have, but I can tell you I have a degree, and so can Mr. Stewart. If I don't have a degree and I'm applying for a job that requires education I'm gonna know how much education I have when I go on an interview for that job.

* * *

APPENDIX B — EXCERPTS FROM PETITIONER'S BRIEF TO THE EIGHTH CIRCUIT

* * *

Applied to the present case, ***Coble, Lams, Greer,*** and ***Roberts*** instruct that Kim Brandt has made a prima facie case. She adduced evidence of what the true qualifications were for an apprentice meat cutter, according to the company's collective bargaining agreement and its own apprentice program developed specifically for the opening at issue. **PX 32, 91 (Appellee's App. 35, 69).** Those qualifications did not change with the new contract, entered into after the promotion at issue. **PX 10 (Appellee's App. 1).** The company could produce nothing but the decision maker's testimony to show that management experience and college were added qualifications for this particular opening — the only apprentice meat cutter opening the company has ever had. The jury reasonably concluded that the added qualifications were not true, but were tailored to fit the preselected man for the job — a man who had virtually no meat experience. That conclusion is bolstered by the evidence that none of the decision makers in the interview asked Frentzel, or even knew at trial, how much college he had, and Frentzel did not write it on the application he filled out after the interview. Neither had Frentzel made it into management at trial time, three and one-half years after he was hired. Clearly, as in ***Coble*** and ***Greer,*** there was evidence that the company adjusted the qualifications it required to fit the man that it wanted for the job.

* * *

APPENDIX C — EXCERPTS FROM RESPONDENT'S BRIEF TO THE EIGHTH CIRCUIT

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